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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 484

UNITED STATES OF AMERICA, PETITIONER

v.

THE COOPER CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 102) is reported in 31 F. Supp. 848. The opinion of the Circuit Court of Appeals (R. 115–118) is reported in 114 F. (2d) 413.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 31, 1940 (R. 119). The petition for a writ of certiorari was filed October 3, 1940, and was granted November 12, 1940. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States can maintain an action under Section 7 of the Sherman Act to recover triple damages for injuries inflicted upon it by an illegal combination and conspiracy.

STATUTE INVOLVED

The pertinent provisions of the Sherman Act (c. 647, 26 Stat. 210, 15 U. S. C. A., Secs. 15 and note, 7) follow:

> SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.
>
> SEC. 8. The word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

STATEMENT

This is a suit brought by the United States under Section 7 of the Sherman Act against eighteen companies engaged in the manufacture and sale of rubber tires to recover triple damages for injuries inflicted upon the United States by an illegal combination and conspiracy to fix collusive prices. The bill of complaint was filed in the United States District Court for the Southern District of New York on February 20, 1939 (R. 1, 3–18).

The pertinent allegations of the bill of complaint may be summarized as follows:

The suit is brought by the United States in its capacity as a purchaser of commodities for consumption by the executive departments of the Government (R. 3). Prior to August 17, 1936, the defendants entered into a combination and conspiracy to fix collusive prices for tires to be sold to the United States (R. 4–5). Pursuant to this combination and conspiracy, the defendants submitted to the Procurement Division of the Treasury Department sealed bids on the tire requirements of the United States for the period October 1, 1936, to March 31, 1937. These bids were identical to the penny on eighty-two different sizes of tires (R. 5–6). The United States purchased tires throughout the period October 1, 1936, to March 31, 1937, at prices collusively fixed by the defendants. These prices were higher than they

would have been had the illegal conspiracy not existed (R. 6–8).

Acting pursuant to the conspiracy, the defendants thereafter again submitted sealed bids to the Treasury Department for the tire requirements of the United States for the next purchasing period which extended from April 1, 1937, to September 30, 1937. These bids were likewise identical to the penny on eighty-two different sizes of tires (R. 8–9). The United States purchased tires from the defendants at these collusive prices through the period from April 1, 1937, to September 30, 1937. These prices were substantially higher than the prices fixed by the conspiracy for the preceding period, October 1, 1936, to March 31, 1937, and were higher than they would have been if the conspiracy had not existed (R. 8–11).

Bids were again submitted by the defendants on the tire requirements of the United States for the period October 1, 1937, to March 31, 1938. These bids, too, were identical to the penny on eighty-two different sizes of tires (R. 13). The prices contained in the identical bids were substantially higher than the prices fixed by the combination and conspiracy for the preceding purchasing period and were likewise higher than they would have been in the absence of the combination and conspiracy (R. 11–12).

Confronted with continued identical bidding and progressive price increases, the Treasury Department sought the counsel of the Attorney General of the United States. The Attorney General advised the Treasury Department that the bids for the period October 1, 1937, to March 31, 1938, should be rejected on the ground that the bids were prima facie the result of a combination in restraint of trade (R. 12). The Procurement Division thereupon rejected the bids, advised the defendants of the grounds for the rejection, and invited the submission of new bids for the same period. The defendants, still acting pursuant to the illegal combination and conspiracy, again submitted sealed bids which were identical to the penny on eighty-two different sizes of automobile tires and which were also identical with the bids which previously had been rejected. The Treasury Department rejected these bids as collusive (R. 12–13).

Thereupon the Treasury Department determined that a public exigency existed and, pursuant to authority conferred by Section 3709 of the Revised Statutes (36 Stat. 861, 41 U. S. C. § 5), made a contract with Sears, Roebuck and Company for the Government's tire requirements for the period October 1, 1937, to March 31, 1938. The prices were lower than the identical bids but higher than they would have been in the absence of the conspiracy (R. 13–14).

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When invited to bid on the Government's tire requirements for the next purchasing period, April 1, 1938, to September 30, 1938, the defendants submitted competitive bids. As a result, the United States was able to buy tires for this period from the defendants at prices which were substantially lower than the prices at which it had purchased its tires for the two preceding periods—October 1, 1936, to March 31, 1937, and April 1, 1937, to September 30, 1937—and which were also lower than the prices at which the Government had purchased its tires from Sears, Roebuck and Company during the period October 1, 1937, to March 31, 1938 (R. 14–15).

Between October 1, 1936, and September 30, 1938, there was no decline in the retail prices of tires to the general public throughout the United States. Had it not been for the conspiracy the Government would have been able to purchase tires for the three periods—October 1, 1936, to March 31, 1937; April 1, 1937, to September 30, 1937; and October 1, 1937, to March 31, 1938—at prices at least as low as the prices at which it purchased tires during the period April 1, 1938, to September 30, 1938 (R. 15).

The damages inflicted upon the United States amount to $351,158.21 and the bill of complaint asks judgment for three times this amount, or $1,053,474.63 (R. 16–17).

The defendants filed motions to dismiss on the ground that the bill of complaint failed to state a claim against the defendants (R. 101).[1] The sole ground urged by defendants in support of their motion was that the United States is not a "person" within the meaning of Section 7 of the Sherman Act. The District Court upheld the defendants' contention (R. 102–108) and dismissed the complaint (R. 109).

An appeal was taken to the United States Circuit Court of Appeals for the Second Circuit; that court, with Judge Clark dissenting, affirmed the judgment of the District Court (R. 119).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the United States has no right to maintain an action under Section 7 of the Sherman Act, and

(2) In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

Section 7 of the Sherman Act gives the United States the right to maintain an action for triple damages. The words "any person" in the section are broad enough to include the United States be-

[1] The defendant F. G. Schenuit Rubber Company is no longer a party to the suit. On April 27, 1939, the District Court entered an order vacating and setting aside the service upon this defendant (R. 1).

cause it is a juristic person and as such is ordinarily entitled to all legal remedies available to anyone else. *Dugan* v. *United States,* 3 Wheat. 172, 181; *United States* v. *Gear,* 3 How. 120; *Cotton* v. *United States,* 11 How. 228, 231.

Section 7 is not qualified or limited in any way by Section 8. That section is not restrictive in form or in effect. It was added for the purpose of making certain that corporations would be subject to the Act and not for the purpose of narrowing the scope of Section 7. It adds nothing to the meaning which Section 7 would have if it stood alone. Any other construction of Section 8 should be rejected because it would turn words of inclusion into words of crippling limitation. Moreover, it seems clear that if Congress had intended to exclude the United States in Section 8 it would have done so expressly and without ambiguity.

Inasmuch as Section 7 is not qualified or limited by Section 8, the words "any person" in Section 7 should be given the broad meaning which Congress intended. The fact that Section 7 does not refer expressly to the United States is not controlling. *Stanley* v. *Schwalby,* 147 U. S. 508, 517; *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, 91–92; *Nardone* v. *United States,* 302 U. S. 379. The statute is remedial and should be liberally construed. Because it confers a general right or remedy the United States is entitled to its benefits even though not expressly named. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239.

The United States is the largest single purchaser of goods in the country. In a recent twelve months' period it expended more than $860,000,000 in the purchase of goods. The amount of its purchases will be greatly increased by the defense program. The expenditure of more than $16,000,000,000 has been authorized and contracts calling for the payment of more than $10,000,000,000 have already been awarded in furtherance of that program. The fact that the United States is the largest purchaser of goods in the country and that its purchases are paid for with public funds are persuasive reasons for giving to it the remedy created by Section 7. Experience has shown that the United States, like any other purchaser, can be victimized by combinations and conspiracies. The other remedies given by the Act to the United States in its sovereign or governmental capacity do not enable the United States to deal with the problem of collusive bidding nor do they protect it when it has been required by circumstances to purchase at collusive and noncompetitive prices. There is no force in the argument that the remedies given to the United States by way of indictment or injunction are exclusive; those remedies cannot protect its proprietary interests or compensate it for the damages which respondents have inflicted upon it.

If Section 8 is to be regarded as limiting or qualifying Section 7 then the words of Section 8

should be construed as including the United States
The United States can properly be regarded as
corporation or an association existing under an
authorized by the laws of the United States. Th
definition of "person" in Section 8 is obviousl
drawn to include all kinds of corporations and as
sociations. The purpose of the definition is no
served by drawing artificial distinctions betwee
the United States and other corporations and as
sociations.

The arguments advanced by respondents in sup
port of their position are without merit. The legi
lative history of the antitrust laws does not sup
port the conclusion that Congress intended to di
criminate against the United States and to depriv
it of a remedy open to every other juristic perso
The decision in *Davis* v. *Pringle,* 268 U. S. 31
relied upon by respondents, is not controlling he
There the United States was seeking priority in th
distribution of the assets of an insolvent estat
Here the United States seeks not priority bu
equality of treatment with all other juristic pe
sons. Furthermore, the statute involved in *Dav*
v. *Pringle,* 268 U. S. 315, gave to the United Stat
a limited right of priority and the Court regarde
this circumstance as indicating that Congress d
not intend to give any broader right of priorit
Here, unless the United States can sue under Se
tion 7, it is without a remedy and cannot recov
in any way for the damages which responden
have inflicted upon it. The subsequent legislati

history of the Bankruptcy Act and subsequent decisions of this Court create grave doubt as to whether *Davis* v. *Pringle,* 268 U. S. 315, lays down any principle which now possesses vitality.

Failure of the United States to assert its rights under Section 7 is not an administrative interpretation of the statute which is entitled to any weight whatsoever. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 224; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757, 759; *Kansas City So. Ry. Co.* v. *United States,* 252 U. S. 147, 151.

ARGUMENT

I

SECTION 7 OF THE SHERMAN ACT CONFERS UPON THE UNITED STATES THE SAME REMEDY WHICH IT GIVES TO EVERY OTHER JURISTIC PERSON; ANY OTHER CONSTRUCTION OF THE SECTION IS INCONSISTENT WITH THE BASIC STATUTORY PURPOSE

The only issue in this case is whether the United States can bring an action under Section 7 of the Sherman Act to recover triple damages for injuries inflicted upon it by an illegal conspiracy. In bringing the action, the United States does not assert any sovereign or prerogative right. It seeks to exercise a remedy which is admittedly available to every other juristic person. Its purpose in doing so is not to punish or to penalize the respondents but to obtain compensation for actual damages

amounting to more than $350,000 which they have wrongfully inflicted upon the United States.

The position of the United States in this case rests upon customary and well-established principles. The right of the Government to protect its property and to recover compensation for damages inflicted upon its proprietary interests has long been recognized. In this respect it stands upon the same footing as any other owner of property. If respondents had stolen or destroyed Government property or had victimized the United States and its taxpayers by any of the familiar methods of force, fraud, or deceit, their liability in damages would be unquestioned. Here they seek to avoid that liability by taking refuge in a highly technical and artificial construction of Section 7 of the Sherman Act. The asserted construction leaves the United States powerless to recover compensation for the deliberate damage which respondents have inflicted upon it, and thus denies to the United States a measure of protection given by the statute to every other juristic person, even including corporations organized under the laws of foreign countries. This result is so anomalous that only the most explicit and preemptory command by Congress can justify its adoption. That command cannot be found in the Sherman Act; the language of the statute, read in the light of the purpose which the Act was intended to achieve, neither requires nor justifies the construction of

the statute which the respondents now urge upon this Court.

Section 7 provides broadly that any person who is injured by an illegal combination or conspiracy shall recover triple damages. The language of the section is sweeping and unqualified. Considered alone, and without reference to Section 8, this language confers a remedy upon any juristic person injured by an illegal combination or conspiracy.[2] The use of the two words "any person" shows that Congress intended to confer a remedy upon every juristic person, no matter of what description. It is doubtless true that by the use of more words Congress could have given more precise expression to its intent. But there are no two words in the language broader in their scope or better designed to achieve the congressional purpose than the words "any person." If they fail to do so it is not because of any intent on the part of Congress to limit the class to which it gave a remedy but simply because there is no concise expression in the language adequate to accomplish the broad intent of Congress.

The United States is a juristic person with legal rights, duties, powers, and privileges. It may make contracts to purchase goods, it may hold and convey property, and it may sue and be sued in its own name. Because it is a juristic person, the

[2] The question of whether the language of Section 7 is qualified or limited in any way by Section 8 or by other provisions of the statute is discussed at pages 28–30, *infra*.

United States is ordinarily entitled to all of the legal remedies available to other persons even in the absence of an explicit statutory grant of those remedies. *Dugan* v. *United States,* 3 Wheat. 172, 181; *United States* v. *Gear,* 3 How. 120; *Cotton* v. *United States,* 11 How. 228, 231.[3] Accord: *Dollar*

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[3] In *Dugan* v. *United States*, 3 Wheat. 172, the Court held that the endorsement of a bill of exchange to the Treasurer of the United States entitled the United States to maintain an action on the bill against a prior endorser, even though there was no express statutory authorization for the suit.

In *United States* v. *Gear*, 3 How. 120, the right of the United States to maintain an action of trespass for taking ore from lead mines located on public lands was not questioned.

In *Cotton* v. *United States*, 11 How. 228, an action of trespass was brought against the defendant for cutting and carrying away trees from the public land. The Court rejected the arguments that the only remedy was by indictment and that the United States has no common-law remedies for private wrongs. The Court said (p. 231):

"Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal. * * * But the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have."

Savings Bank v. *United States,* 19 Wall. 227; *United States* v. *Chamberlin,* 219 U. S. 250.

The fact that the statute confers the remedy broadly on "any person" and that the United States is admittedly a juristic person should establish the right of the United States to maintain this suit unless it is to be assumed either (1) that the word "person" in Section 7, considered without reference to Section 8, refers only to "natural" persons and thus excludes entirely the idea of juristic personality, or (2) that even if the word "person" includes juristic persons the Court must nevertheless construe the word as excluding the United States. Neither assumption can be supported. Even in the absence of the definitions in Section 8, Congress could not have intended the word "person" in Section 7 to mean solely a "natural" person. No rule of statutory construction requires that the word be given this restricted meaning.[4] The true rule is that the meaning of

[4] As long ago as 1833 a broader meaning of the word was adopted by statute in England. Thus in 3 & 4 Wm. IV, c. 74, sec. 1, it was provided:

"The Word 'Person' shall extend to a Body Politic, Corporate, or Collegiate, as well as an Individual."

This construction was affirmed by the Interpretation Act of 1889, 52 & 53 Vict., c. 63, sec. 19, which provided:

"In this Act and in every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."

And see Dewey, *The Historic Background of Corporate Legal Personality,* 35 Yale L. J. 655, 656–657.

"person" depends in each case upon the intent of the legislature as determined by the circumstances in which the word is used. See *Ohio* v. *Helvering,* 292 U. S. 360, 370–371; *Nardone* v. *United States,* 302 U. S. 379, 383–384.

If we consider the character and purpose of the statute in which Section 7 stands, there can be no doubt as to the incongruity of construing "person" as meaning only a "natural" person. The Sherman Act has been described as "a charter of freedom" (*Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 359) and as "a broad enactment prohibiting unreasonable restraints upon interstate commerce" (*United States* v. *Borden Co.,* 308 U. S. 188, 199). A statute which attempts to deal in sweeping terms with economic and industrial problems can hardly be construed as applicable only to individual men and women. It must necessarily be regarded as imposing duties and conferring remedies upon all of the various forms of organization which exist in the business and economic world.[5] Even in the absence of the definitions contained in Section 8, it would be necessary to read this

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[5] Cf. *United Mine Workers of America* v. *Coronado Co.,* 259 U. S. 344, where this Court, in holding that an unincorporated labor union could be sued under Section 7, said (page 392):

"Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any persons or combinations of persons should escape its application."

broader meaning into Section 7 if the purpose of the statute was to be achieved.

Support for this conclusion is supplied by the fact that four years after the passage of the Sherman Act, Congress passed the Wilson Tariff Act which made illegal combinations or conspiracies to restrain the importation of goods in foreign commerce (Act of August 27, 1894, c. 349, 28 Stat. 509, 15 U. S. C. A., Secs. 8–11, 15 and note). That Act contained a triple-damage provision which, following the form of Section 7, conferred the remedy upon "any person who shall be injured in his business or property by any other person or corporation by reason of any thing forbidden or declared to be unlawful by this Act * * *." That statute contains no provision, similar to Section 8, defining "person" as including a corporation or an association, but it can hardly be suggested that the remedy which it gives is available only to "natural" persons.

Since, then, the word "person" in Section 7 cannot mean only a "natural" person, we may now consider whether there is any reason why the United States should not fall within the class of juristic persons given a remedy by the section. There is no categorical canon of construction which requires the United States to be specifically named if it is to enjoy the benefits or remedies conferred by a statute. On the contrary, the United States has frequently been held to be within beneficial statutory provisions which apply only to "per-

sons" and make no express reference to the United States. *Stanley* v. *Schwalby*, 147 U. S. 508, 517; *Helvering* v. *Stockholms &c. Bank*, 293 U. S. 84, 91–92; *Nardone* v. *United States*, 302 U. S. 379. Cf. *Ohio* v. *Helvering*, 292 U. S. 360, 370–371.[6]

In *Nardone* v. *United States*, 302 U. S. 379, 383–384, this Court in considering the canon of interpretation that the general words of a statute do not include the Government pointed out that it is applicable in only two classes of cases: (1) where the statute if not so limited would deprive the sovereign of a recognized prerogative, right, title, or interest [6a] and (2) where a reading of the statute

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[6] The state courts have likewise frequently interpreted the word "person" standing alone in a statute as including political entities. *Republic of Honduras* v. *Soto*, 112 N. Y. 310 (foreign nation held to be a "person" within a statute requiring nonresident persons to provide security for costs in litigation). Accord: *Ohio ex rel. Fulton* v. *Saal*, 239 App. Div. 420, *appeal dismissed on other grounds*, 264 N. Y. 465; *Giddings* v. *Holter*, 19 Mont. 263 (the United States is a person within the terms of a covenant of quiet enjoyment which referred to claims by "all and every person or persons"); *Martin* v. *The State*, 24 Tex. 61, 68 (the State of Texas held to be a person within the meaning of a statute which made it a crime to make a false entry with the intent to defraud "any person"); *County of Lancaster* v. *Trimble*, 34 Neb. 752, 756 (a county held to be a person within the meaning of a statute which authorized "any person" to foreclose a tax lien); *Peters* v. *Grubb*, 21 Pa. 455 (a state held to be a person within the meaning of a covenant of quiet enjoyment which referred to claims or molestation by any "person or persons"). And see Black on *Interpretation of Laws* (1896), p. 122.

[6a] The United States will rely upon this aspect of the rule in *United States* v. *Sherwood*, No. 500, this Term.

which would include the Government or its officers would work obvious absurdities. It can hardly be suggested that this case falls in either category.

Section 7 is intended to provide compensation for injuries to property, and is remedial in purpose.[7] The rule is that if the statute is remedial,

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[7] The federal courts have almost uniformly taken this view of Section 7. Thus, for the purpose of applying statutes of limitation, the courts have held that an action under Section 7 is remedial and not an action to recover a penalty or forfeiture. *City of Atlanta* v. *Chattanooga Foundry*, 101 Fed. 900 (C. C. A. 6th), *reversed on other grounds*, 127 Fed. 23 (C. C. A. 6th), *affirmed* 203 U. S. 390; *Hansen Packing Co.* v. *Swift & Co.*, 27 F. Supp. 364, 367 (D. C. S. D. N. Y. 1939), *Jones & Co.* v. *West Publishing Co.*, 270 Fed. 563, 566 (C. C. A. 5th); *Shelton Electric Co.* v. *Victor Talking Mach. Co.*, 277 Fed. 433 (D. C. N. J. 1922).

The same view has been taken in cases involving the question of whether the right to sue under Section 7 survives death. *Sullivan* v. *Associated Billposters, etc.*, 6 F. (2d) 1000, 1009 (C. C. A. 2d); *Imperial Film Exch.* v. *General Film Co.*, 244 Fed. 985 (D. C. S. D. N. Y. 1915); *Moore* v. *Backus*, 78 F. (2d) 571 (C. C. A. 7th).

See also *Baush Machine Tool Co.* v. *Aluminum Co.*, 63 F. (2d) 778, *cert. denied*, 289 U. S. 739, holding that an action under Section 4 of the Clayton Act for triple damages is not a suit for penalty and, hence, that a bill of discovery may be maintained in aid of the suit.

The cases are collected and examined in *Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?* by Lawrence Vold, 28 Ky. L. J. 117–159. The author concludes (p. 159):

"As already shown, the threefold damage provision is here compensatory in its nature, in liquidating compensation for accumulative intangible harm going beyond the ordinarily recoverable legal damage to the business or property."

See also *Right of United States to Sue for Treble Damages*, 89 U. of Pa. L. Rev. 243–245, fn. 10.

or if it confers general rights, the United States may enjoy its benefits even though not expressly named.[8] *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *United States* v. *Chamberlin*, 219 U. S. 250, 260–261; *The Northern No. 41*, 297 Fed. 343, 344, 345 (D. C. S. D. Fla.); *Commonwealth* v. *The Boston & Maine Railroad*, 3 Cush. 25, 45 (1849); *Magdalen College Case*, 11 Coke Rep. 66b; Black, *Interpretation of Laws* (1896), p. 122; Chitty, *Prerogatives of the Crown*, p. 382; *Bacon's Abridgement, Title Prerogative*, E, 5, Vol. 8 (Bouvier's Ed., Philadelphia 1852), p. 92.

Thus, we may dismiss the argument that there is any rule of construction or interpretation which requires the Court to hold that the words "any person" do not confer upon the United States the benefit of the statute. Indeed, if the rules of construction, standing alone, can be said to throw any light upon the issue they appear affirmatively to support the conclusion that the words include the United States within their scope.

This interpretation of the section is consistent with the plan of the statute as a whole. Congress intended that at least three different remedies should be available against persons who engage in illegal combinations and conspiracies and that these remedies might be prosecuted concurrently.

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[8] In *Nardone* v. *United States*, 302 U. S. 379, the word "person" was held to include the United States within a prohibition against wire tapping, although the decision operated to restrain the activities of the Government.

See *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 52. Persons who conspire to restrain trade can be prosecuted criminally, they may be enjoined by a court of equity, and, finally, they may be liable in damages at the suit of any person who has been injured by their illegal activities.[9] Each of these three remedies is designed to serve a different purpose. Of the three remedies, only the one given by Section 7 provides compensation for injuries to proprietary interests. In cases where injuries have been inflicted upon private citizens this remedy admittedly may be pursued concurrently with the other remedies conferred by the act.

It may fairly be concluded that Congress intended that in the case of each violation the United States should have the power to punish or to prevent, and the injured person the power to recover for any damages inflicted in violation of the statute. It is not to be supposed that Congress intended that the remedies should cease to be concurrent merely because the person injured was the United States. Certainly Congress could not have intended that it should be any less dangerous for respondents to victimize the United States by an illegal conspiracy than it should be for them to injure any one else, nor could it have intended to

[9] Section 6 of the Act also permits the United States to seize and condemn property which is being transported in interstate or foreign commerce pursuant to an illegal combination or conspiracy.

discriminate against the United States by depriving it of a remedy that is available to every other person. In *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174, this court pointed out that the remedies given the Sherman Act are "co-extensive" with the "broad conceptions of public policy" which underlie the statute. If, as the provisions of the statute indicate, one of the conceptions of public policy upon which it rests is that every juristic person shall be entitled to compensation for damages inflicted by violations of the act and that this remedy may be pursued concurrently with whatever other remedies the Government exercises in its sovereign capacity, we must conclude that to deny the United States the right to damages is to do violence to the statutory plan.

Respondents can point to no conception of public policy, broad or narrow, which justifies denying the United States the right to protect its financial interests or which can serve in any measure as a basis for an arbitrary distinction between the United States and other juristic persons who purchase goods. In this respect the United States should stand on precisely the same footing as any other purchaser. It is true that its purchases are larger in amount than those made by any other single person or organization and that they are paid for out of the public funds. But these circumstances supply no support for respondents' arguments; rather they are additional reasons for construing the act so as

to give the United States the same remedy which is available to every other person. An authoritative study made for the Temporary National Economic Committee shows that in a recent twelve months' period the total purchases of goods by the Federal Government and its agencies amounted to $913,401,724.91.[9a] The dollar volume of Government purchases has been strikingly increased by the national defense program. By the end of December 1940, Congress had authorized the expenditure of upwards of 16 billion dollars in furtherance of that program, and contracts had actually been awarded for the purchase of goods which called for the payment of more than 10 billion dollars.[10]

Congress has adopted legislation designed to insure that Government purchases shall be made in a free market and at competitive prices. Section 3709 of the Revised Statutes (36 Stat. 861, 41 U. S. C. Sec. 5) requires that, except in cases of public exigency, all purchases and contracts for supplies shall be made on the basis of bids submitted in response to public advertisements. It was enacted

[9a] Temporary National Economic Committee Monograph No. 19, *Government Purchasing—An Economic Commentary* (United States Government Printing Office 1940), at page 145. The period covered ran from December 1937 through November 1938.

[10] *The National Defense Advisory Commission—Functions and Activities*, issued by the Advisory Commission to the Council for National Defense, December 28, 1940, (United States Government Printing Office), pages 3, 10.

to protect the purchasing activities of the Government. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 126. This congressional policy embodied in Section 3709 is completely frustrated when bidders agree among themselves upon collusive, arbitrary, and non-competitive prices. It would be anomalous indeed to construe Section 7 in a manner which would contradict rather than implement the purpose of Section 3709. Even when contracts are let by negotiation rather than by competitive bidding, it seems apparent that Congress intended that the purchases should be made in a free market.

The problem of collusive bids is serious and recurrent; for many years it has occupied the attention of purchasing agencies and the law officers of the Federal Government. The study made for the Temporary National Economic Committee, which has been referred to above, shows that of $913,401,724.91 expended by the Government in a 12-month period, $87,326,426, or approximately 9.6 percent, was spent in purchases which involved identical bids.[11] It should be pointed out that this figure is not necessarily indicative of the extent of the practice of submitting collusive and noncompetitive bids. It is probable that in some

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[11] Temporary National Economic Committee Monograph No. 19, *Government Purchasing—An Economic Commentary* (United States Government Printing Office 1940). For the figures, see pages 312–313. For an analysis and description of different categories of identical bids, see page 31.

instances collusive bids were submitted which were not identical in amount.[12] It is also significant that the study refers to rubber tires as one of the commodities with respect to which "the problem of identical bidding has at times been acute."[13]

The construction of Section 7 adopted by the court below leaves the United States powerless to recover damages for injuries inflicted upon it by illegal combinations and conspiracies and deprives it of an effective weapon for dealing with collusive bids. It is true that in theory the United States is free to reject bids which appear to be based upon illegal combinations and conspiracies. But the need for supplies is often so urgent and immediate that as a practical matter rejection is impossible. This is particularly true at the present time with respect to supplies and materials required by the Army and Navy. The exigencies of the situation do not permit the Government to indulge in the extensive investigation or the prolonged bargaining which may be necessary to break down a combination or conspiracy designed to compel purchases at collusive and noncompetitive prices. When, as is often the case in the present national emergency, it is necessary for

[12] For detailed testimony with respect to the difficulties which Government agencies have had with collusive bids, see *id.*, at 35–38, 99–115.

[13] The other two commodities referred to as falling into the same classification are cement and steel. *Id.* at 36.

contracts to be let by negotiation rather than by bidding, the opportunity for exposing collusive action is particularly restricted. Furthermore, in many cases no source of supply is available except that of persons who are parties to the combination and conspiracy. As in the instant case, the rejection of bids may simply lead to the submission of another set of identical bids equally collusive. For all of these reasons the Government, in most circumstances, has no choice but to purchase goods, endure whatever damage the conspiracy may inflict, and later to seek compensation for the injury it has suffered.[14]

The provisions of the antitrust laws providing for criminal proceedings and for suits in equity afford no remedy to the United States in cases where it has been required by circumstances to purchase goods on the basis of noncompetitive and collusive prices or where it is faced with persistent collusive bidding. If the goods are required at once, the United States cannot await the final disposition of a criminal proceeding or a suit

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[14] Although at first sight it might seem that the magnitude of its purchases and the possession of various governmental powers would place the United States in an advantageous bargaining position it is by no means certain that this is the case. There is some reason to believe that in many respects the Government is at a disadvantage in its purchasing operations as compared with private purchasers. See *id.* at 35–37. And compare the circumstances underlying the litigation in *United States* v. *Bethlehem Steel Corp.*, Nos. 362–363, this Term.

in equity. Once the goods have been purchased at inflated and noncompetitive prices, neither an indictment nor an injunction will compensate the United States for the damage it has suffered. An injunction prohibits only future violations and carries with it no right to damages. Under the criminal provisions of the statute the maximum fine which may be imposed is $5,000 and the maximum period of imprisonment is one year. Even if these sanctions should be enforced in the instant case, they could not compensate the United States for the damages which wrongful acts have inflicted upon it. Indeed, it is obvious that they were never intended for this purpose.

II

THE OTHER PROVISIONS OF THE SHERMAN ACT DO NOT LIMIT OR QUALIFY SECTION 7 SO AS TO DEPRIVE THE UNITED STATES OF THE RIGHT TO MAINTAIN THIS ACTION

In deciding that the United States cannot maintain a suit under Section 7 the majority of the Circuit Court of Appeals relied upon the fact that Section 8 of the statute defines "person" without referring to the United States[15] (R. 115–116). This view assumes that Section 8 was intended to qualify or to limit in some way the class of juris-

[15] The majority of the Circuit Court of Appeals also were of the view that the United States could not properly be included in the word "person" in Section 7 because that would mean that the United States might also be sued under the

tic persons entitled to the remedy given by the broad language of Section 7. This assumption rests upon a misunderstanding of the purpose and effect of Section 8. That section is not a restrictive provision; it is not even restrictive in form. It provides that the word "person" wherever used in the act *shall be deemed to include* corporations and associations existing under or authorized by the laws of either the United States, the Territories, any state, or any foreign country. Thus the provision in terms is one of inclusion and not of limitation. The definition in Section 7 is not an "interchangeable equivalent" for the word "person"; the use of the word "includes" indicates that the definition merely specifies particular instances which fall within the general class. See *Helvering* v. *Morgan's, Inc.*, 293 U. S. 121, 125.[16]

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section (R. 116–117). It seems unnecessary to add to the comment which Judge Clark made on this argument in his dissenting opinion. He said (R. 118):

"I do not believe our answer to the question here forecloses discussion of that other question whether the United States is itself subject to suit under Section 7 for possible violations of the Sherman Act. There is no necessary rule of mutuality; Congress could confer the right to sue upon the United States and deny sovereign liability. For my part I am willing to listen to argument upon the latter question if and when it becomes an actual issue. Now I content myself with saying that I am satisfied that the United States may sue under Section 7, and therefore I would reverse the decision below."

[16] The form of Section 7 shows that in fact the draftsman did not regard the definition in Section 8 as an interchangeable equivalent. Section 7 gives the remedy to "any person"

Section 8 was doubtless added out of an abundance of caution and for the purpose of making it clear that the act applied to corporations.[17] It adds nothing to the significance which Section 7 would possess if it stood alone. If this Court is to accept respondents' argument on this point, it must construe a section of the statute which is designed only to expand the class of persons subject to the penal provisions of the statute as limiting the plain meaning of a prior section which is remedial in character. Words intended to expand the scope of the statute thus become words of crippling limitation. This result is hardly consistent with the apparent intent of Congress.

Even if it is assumed that Section 8 was intended to cut down the scope of the word "person" in Sec-

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who shall be injured "by any other person or corporation." The use of the word "corporation" in the one place and not in the other indicates that the draftsman did not think of the definition in Section 8 as applying automatically whenever the word "person" was used. The form of the section also shows that the draftsman was not using the words "person" and "corporation" with the high degree of precision which respondents' argument assumes.

[17] One commentator has suggested that Section 8 was added so that there could be no doubt that a corporation was subject to a fine under the act. See *Claim of United States for Treble Damages under the Sherman Act* (1940), 35 Ill. L. Rev. 223–224, fn. 10. The commentator concludes:

"Section Eight does not serve, either by its terms or in its purpose, to limit the definition of 'person' to those agencies specifically mentioned in that Section; but rather to expand that term so as definitely to include corporations within its meaning in a statute that provides both a fine and a prison sentence."

tion 7, it is by no means certain that the omission of reference to the United States is of assistance to respondents. Congress was certainly familiar with the historic canon of construction that the state takes the benefits of a statute even though not expressly named. See page 19, *supra*. Had Congress intended to exclude the United States from the scope of Section 7, certainly, in deference to this historic rule, it would have done so expressly and without ambiguity. Elsewhere in the antitrust laws Congress has indicated its belief that the United States falls within the scope of the broad words "any person, firm, corporation, or association." Section 16 of the Clayton Act (38 Stat. 737, 15 U. S. C., Sec. 26) provides that "any person, firm, corporation, or association" may sue for injunctive relief against loss or damage threatened by a violation of the antitrust laws and then adds the following proviso:

> That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce * * *.

In addition, if it is assumed that Section 8 is designed to limit the language of Section 7, it then becomes necessary to give Section 8 a reasonable interpretation which will not so narrow the scope of Section 7 as to impair the effective opera-

tion of the act. It is appropriate, therefore, to consider whether there is any reasonable interpretation of Section 8 which would permit the United States to maintain a suit for triple damages under Section 7. An interpretation is possible which achieves this result without doing violence either to the language of Section 8 or to the decisions of this Court. For the purposes of Section 8 the United States can properly be regarded as a corporation existing under or authorized by laws of the United States. The corporate character of the United States is well established. *Dixon* v. *United States,* 1 Brock 177, 7 Fed. Cas. 761 (Cir. Ct. Va. 1811); *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, 91–92; *Stanley* v. *Schwalby,* 147 U. S. 508, 517; *United States* v. *State Bank,* 96 U. S. 30, 36; *United States* v. *Maurice,* 2 Brock 96, 26 Fed. Cas. 1211; *Cotton* v. *United States,* 11 How. 228, 231; *Van Brocklin* v. *Tennessee,* 117 U. S. 151; *United States* v. *Hill,* 60 Fed. 1005 (C. C. A. 6th); *Denver & R. G. R. Co.* v. *United States,* 241 Fed. 614 (C. C. A. 8th). Cf. *United States* v. *Perkins,* 163 U. S. 625, 631.

The court below took the view that even though the United States is a corporation or association it does not exist under or is not authorized by the laws of the United States (R. 116). But nothing in Section 8 or in the decisions of this Court requires this conclusion. If it were necessary to match technicalities with the opinion below, it would be enough to point out that in Article VI,

the Constitution, under which the United States was created, describes the Constitution itself as "the supreme law of the land." See *McCulloch* v. *Maryland*, 4 Wheat. 316, 406; *Ex Parte Siebold*, 100 U. S. 371, 392. The United States is itself, therefore, a corporation created under or authorized by the laws of the United States.

But, more broadly, the decision below reading into Section 8 a distinction between the United States and other corporations, introduces an artificial refinement into the section which defeats its purpose. The definition was obviously drawn to include all corporations and associations; for example, it covers not only corporations and associations existing under the laws of the United States but those existing under state and territorial laws as well, and even those existing under the laws of a foreign country. This broad purpose is not accomplished by hypertechnical distinctions between one kind of corporation or association and another. See *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, 392. The definition admittedly covers a corporation organized under an act of Congress. The Tennessee Valley Authority, the Reconstruction Finance Corporation, the Smithsonian Institution, and any other federal corporation is clearly entitled to the remedy provided by Section 8. If the Procurement Division of the Treasury Department, which purchased the tires involved in the instant case, had been incorporated, its right to sue under Section

7 would be admitted. To paraphrase the words of this Court in *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 523, the motives which may lead the Government to clothe its activities in corporate form are entirely unrelated to the problem of obtaining compensation for financial damage inflicted by an illegal conspiracy. The power of the United States to recover damages under Section 7, therefore, should not depend upon the fortuitous circumstance of purchases being made by a Government corporation rather than by an unincorporated arm of the Government.

Respondents argued below that the remedies conferred upon the United States are to be found in the sections of the statute which provide for criminal proceedings and suits for injunctions to restrain future violations, that these remedies are exclusive, and that their existence indicates that no additional remedy was intended to be conferred by Section 7. This argument ignores the salient characteristic of the statutory scheme. As we have pointed out, Congress obviously intended that three different remedies—the indictment, the injunction, and the suit for damages—should be available against persons who engage in illegal combinations and conspiracies and that these remedies might be prosecuted concurrently (see pp. 20–22, *supra*). The remedies of indictment, injunction, and forfeiture were given to the United States in its governmental or sovereign capacity as the law-enforcing agency; they do not serve to protect the finan-

cial or proprietary interests of the United States as a purchaser of goods or to compensate it for damages suffered as a result of an illegal conspiracy. An argument that the proprietary interests of the United States are left without protection cannot be answered by pointing to remedies designed solely to vindicate its sovereign political power. Cf. *Cotton* v. *United States*, 11 How. 228 231.

III

THE CONCLUSION THAT THE UNITED STATES HAS NO REMEDY UNDER SECTION 7 CANNOT BE SUPPORTED BY LEGISLATIVE HISTORY, THE DECISIONS RELIED UPON BY RESPONDENTS, OR ADMINISTRATIVE PRACTICE

1. *Legislative History.*—Even if it be assumed, and this we do not concede, that the meaning of Section 7 is so doubtful or obscure that a resort to legislative history is proper, that history lends no support to respondents' argument.[18] In the court below the respondents sought to support their position by inferences drawn from statements made in congressional debates. Those statements were not directed to the precise problem now before the Court. In most cases they do not relate to Section 7 as it now exists. Many of them were made when the statute under consideration contained provisions so different from the provisions which

[18] Although in the court below the respondents argued that the legislative history supported their view, it should be noted that the majority of the Circuit Court of Appeals did not purport to rely upon that history in reaching a decision.

were finally enacted into law that they have no significance to the present issue. Because of the circumstances in which the statements were made, their meaning in most cases is highly ambiguous. In some instances they appear to support the position of the respondents; in others they appear to support the position taken by the United States. The appendix to this brief sets forth all of the colloquies which appear to have any bearing whatsoever upon the present issue and describes the circumstances in which they occurred.[19] This appendix shows that the congressional debates for the most part obscure rather than illuminate the problem.[20] The effect of the arguments in this case as to legislative history may well be described in words used by this Court in *Federal Communications Comm'n* v. *Columbia Broadcasting System,*

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[19] See pages 50–80, *infra.*

[20] The words of this Court in *United States* v. *Freight Ass'n*, 166 U. S. 290, are also appropriate. The Court said with respect to the legislative history of the Sherman Act (p. 318):

"Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. All that can be determined from the debates and reports is that various members had various views, and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein."

No. 39, this term, decided November 25, 1940. The Court said (p. 3):

> What thus appears clear from a reading of the Communications Act itself is not modified by the collateral materials which have been pressed upon us. That both sides invoke the same extrinsic aids, one to fortify and the other to nullify the conclusion we have reached, in itself proves what dubious light they shed. What was said in Committee Reports and some remarks by the proponent of the measure in the Senate are sufficiently ambiguous, insofar as this narrow issue is concerned, to invite mutually destructive dialectic but not strong enough either to strengthen or weaken the force of what Congress has enacted.

Compare *United States* v. *Stewart*, No. 50, decided November 12, 1940, and *Gorin* v. *United States*, No. 87, decided January 13, 1941.

In the debates which preceded the passage of the Clayton Act in 1914 one statement was made on the floor of the Senate which requires comment. The statement was made by Senator Culberson, then Chairman of the Judiciary Committee of the Senate, in connection with a proposed amendment of the provisions now contained in Section 5 of the Clayton Act.[21] The section under consideration

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[21] Section 5 provides:

"A final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the

provided that a judgment or decree rendered "in any suit or proceeding in equity" brought by the United States should be prima facie evidence in any other proceeding under the antitrust laws. It was proposed on the floor of the Senate to amend this provision so that a decree or judgment entered in an action at common law, a criminal prosecution, or a suit in equity brought by the United States should be prima facie evidence. This amendment was not adopted and the provision was finally adopted in the form in which it now appears in Section 5 of the Clayton Act. In opposing the proposed amendment Senator Culberson said (51 Cong. Rec. 13898, 63rd Cong., 2d Sess.):

> There is no suit authorized by any of these statutes by the United States except a criminal prosecution or a suit in equity. The United States does not bring a suit at law for damages.

It can hardly be denied that this statement is inconsistent with the position taken by the United States in this case. It should be pointed out, however, that in the circumstances the statement can hardly represent a discriminating analysis or criticism of the issue here involved; that it was

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antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: * * *."

made by the Senator with reference to a somewhat different problem; and that, at best, it represents the unconsidered opinion of one member of one house of Congress. Standing alone, the statement is not a sufficient basis for a construction of the statute which disregards the plain meaning of the words of Section 7, impairs to a large measure the purpose of the statute, and denies to the United States a remedy which is given to every other person.

That all of the members of Congress were not in agreement with Senator Culberson when the Clayton Act was passed is indicated by a colloquy which took place on the floor of the House of Representatives.[22] In the course of a discussion of the remedies available under the Act, Mr. Webb, who was Chairman of the Judiciary Committee of the House and in charge of the bill on the floor, pointed out that there were five civil remedies available under the Act (51 Cong. Rec. 16275). Later the following exchange of views took place (51 Cong. Rec. 16276):

> Mr. RUSSELL. I understand the proceeding by injunction for relief of the parties damaged is not the only remedy.
>
> Mr. WEBB. Oh, no; it is only one of five different remedies.

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[22] A detailed statement of this circumstance of this colloquy is found in the appendix, p. 76, *infra*.

Mr. RUSSELL. They have the right to sue for damages or for treble damages without any injunction proceeding at all.

Mr. WEBB. Certainly; the remedies are cumulative. The remedies pile up, and all of the remedies are open to the individual and to the Government in a suit.

2. *The decisions relied upon by respondents.*— Prior to the institution of this suit, no court had ever considered the precise issue which it raises. Consequently, the decisions cited by the respondents are not presented as *ad hoc* determinations of the question under consideration. Reliance is placed rather upon general language found in certain opinions which discuss the general plan of the Sherman Act. Examination of this language shows that in fact it gives no substantial support to respondents' arguments. In some cases the courts have pointed out that only the United States can initiate and prosecute criminal proceedings and that Section 7 is the only part of the Act which confers any remedy whatsoever upon private litigants.[23] In other cases the courts have described actions brought under Section 7 as "pri-

[23] Language of this kind is found in *Pidcock* v. *Harrington*, 64 Fed. 821 (C. C. S. D. N. Y.); *Greer, Mills & Co.* v. *Stoller*, 77 Fed. 1 (C. C. W. D. Mo.); *United States* v. *Patterson*, 201 Fed. 697 (S. D. Ohio, 1912), *reversed on other grounds*, 222 Fed. 559, *cert. denied*, 238 U. S. 635, cited by respondents and by the majority of the court below.

vate actions."[24] These points are beyond controversy, but to accept them is not to accept the conclusion that the United States has no rights under Section 7. In some of the opinions relied upon by respondents it is said that the remedies provided by the Act are exclusive in the sense that no common law remedies remain.[25] That is doubtless true, but the question here is what remedies are conferred by the statute upon the United States. The fact that the United States has no other remedies does not narrow the scope of Section 7; it rather supports the view that the United States, like all other persons, is entitled to the remedies created by that section.

Respondents also relied below upon decisions construing other statutes. Necessarily these decisions carry little weight. They relate to statutes containing language different from that in the Sherman Act and intended to accomplish a different purpose. They fall short of establishing that as a matter of law the United States is not a juristic person or that it cannot take advantage of the benefits of the statute unless expressly named.

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[24] See, for example, *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261. In one sense even a suit brought by the United States under Section 7 may properly be described as a "private" suit. It is "private" in the sense that it is a suit to recover for damages inflicted upon the United States in its proprietary aspect rather than to vindicate its sovereignty. In other words, in such a suit the United States stands on the same footing as any private person.

[25] See, for example, *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165.

In fact, the rule is otherwise (see pages 13–15, 19, *supra*).

The respondents' chief reliance is placed upon *Davis* v. *Pringle,* 1 F. (2d) 860 (C. C. A. 4th), *affirmed,* 268 U. S. 315. The question for decision there was whether the United States was entitled to a preference in bankruptcy under Section 64 (b) (5) of the Bankruptcy Act of 1898, which provided for priority in payment of "debts owing to any person who by the laws of the states or the United States is entitled to priority." This Court held that the United States was not entitled to the preference. The Court predicated its decision primarily upon the fact that elsewhere in the Bankruptcy Act a limited priority for taxes had been expressly given the United States and that since this preference was expressly created, it was a fair inference that it was the only preference Congress intended the United States to have. If in the instant case the Sherman Act, elsewhere than in Section 7, conferred upon the United States some limited right to recover compensation for the injuries which it has suffered, say a right to sue for simple damages, then the case would be analogous to the situation presented in *Davis* v. *Pringle,* 268 U. S. 315, and the decision there would be a persuasive authority. But here the only section of the Act which purports to confer any right to recover damages is Section 7. Accordingly, that section cannot be limited by reference to remedies con-

ferred elsewhere in the Act. This is particularly true because, as we have pointed out, the criminal and equitable remedies, directed to wholly different ends, are in no way substitutes for the remedy which the United States seeks here.

Furthermore, it is significant that in *Davis* v. *Pringle,* 268 U. S. 315, the United States sought a preferred position in the distribution of the assets of the insolvent estate. Here, on the other hand, what the Government seeks is right equal to, but no greater than, that conferred upon every other person. It should also be noted that in *Davis* v. *Pringle,* 268 U. S. 315, the Supreme Court found that the legislative history of the statute indicated clearly that Congress did not intend to give to the United States the particular priority claimed. No showing of this kind can be made with respect to the intent of Congress in enacting Section 7 of the Sherman Act.

The subsequent legislative history of the provision of the Bankruptcy Act construed in *Davis* v. *Pringle,* 268 U. S. 315, and the subsequent course of decisions in this Court create grave doubt as to whether that decision can be regarded as laying down any rule of general application. Whatever may have been true of its prior intent, Congress, immediately after the decision of the Supreme Court, amended Section 64 (b) of the Bankruptcy Act so as expressly to confer priority upon the United States (Act of May 27, 1926, c. 406, Sec. 15;

44 Stat. 666).[26] It should also be noted that in each of the three cases which subsequently presented the question this Court, looking at the general legislative purpose, held that the word "person" included a political entity. *Ohio* v. *Helvering,* 292 U. S. 360; *Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84; *Nardone* v. *United States,* 302 U. S. 379.

Respondents also relied upon the decision in *United States* v. *Fox,* 94 U. S. 315. The only question presented there was whether under the laws of the State of New York the United States could take real estate by devise. The courts of New York held that the United States did not have the capacity to do so.[26a] Under well-established rules the Supreme Court was bound by that construction of the state law. This decision, therefore, has no direct bearing on the construction of a federal statute. It does not even establish the proposition that under the law of the State of New York the word "person," standing alone in a statute, does not include within its scope a body politic. In *Republic of Honduras* v. *Soto,* 112 N. Y. 310, decided in 1889, the Court

[26] In the words of one district court, Congress immediately took steps "to undo the defining that was done by the Supreme Court in the case of *Davis* v. *Pringle* * * *." *In re C. D. Hauger Co.*, 54 F. (2d) 117 (D. C. Tex.). Cf. *Lincoln* v. *Ricketts*, 297 U. S. 373, 376–377.

[26a] When this case was decided it had long been established in New York that only a corporation organized under the laws of New York could take real property by devise. *White* v. *Howard*, 46 N. Y. 144.

of Appeals of New York held that Section 3268 of the Code of Civil Procedure, which required the filing of security in any case in which the plaintiff was "a person residing without the State," applied to the Republic of Honduras. Accord: *Ohio ex rel Fulton* v. *Saal*, 239 App. Div. 420, *appeal dismissed on other grounds*, 264 N. Y. 465.

3. *Administrative Practice.*—Respondents have emphasized that this is the first time the United States has sought to maintain a suit for triple damages under Section 7 and that this failure to act amounts to an administrative interpretation of the law which is now entitled to great weight. Respondents have also suggested that the reenactment of Section 7 in Section 4 of the Clayton Act is a kind of legislative ratification of this administrative interpretation. The Attorney General has never, formally or informally, expressed the view that the United States cannot maintain a suit under Section 7.[27] The bare fail-

[27] The appellants have cited one statement made by the Attorney General in 1926 which they assert is an admission that the United States has no rights under Section 7. An examination of the statement in the light of the circumstances in which it was made shows that it does not bear this meaning. The statement was made in response to a Senate resolution which asked the Attorney General to send to the Senate certain information with respect to cases instituted under the first seven sections of the Sherman Anti-trust Law. In his reply the Attorney General said (Sen. Doc. No. 79, 69th Cong., 1st sess., p. 1):

"I inclose herewith a tabulated statement containing the information requested by the Senate as regards cases in

ure to exercise the rights conferred by Section 7 is not an administrative ruling or interpretation which is entitled to any weight whatsoever. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 224; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 757, 759; *Kansas City So. Ry. Co.* v. *United States,* 252 U. S. 147, 151. Because there has been no administrative interpretation of the section, respondents' argument with respect to the reenactment of the section in the Clayton Act is without importance.

To reinforce their arguments with respect to administrative interpretation, respondents have also referred to certain comments made by students of the antitrust laws and to the report made by the Commissioner of Corporations in 1915.

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which the United States has been the plaintiff or prosecutor, under sections 1 to 6, inclusive, of the act. In reporting criminal cases, the word 'convicted' has been construed to cover persons pleading guilty as well as persons convicted by verdicts of juries.

"Under Section 7, which gives to private persons the right to sue for injuries arising under the act, a number of actions have been instituted. The United States, however, under the statute is not a party to suits under that section. It is not notified of their commencement or their progress and enters no appearance upon the records of the court. The files of this department do not contain full data concerning purely private suits of this type; and I am therefore unable to give the information requested by the last paragraph of the present resolution."

It seems apparent that all the Attorney General was saying here was that the United States was not a party to suits brought by private persons under Section 7 and hence was not in a position to furnish information as to those suits.

The text of the statements by commentators are set forth in a footnote.[28] They are not considered analyses of the problem and, indeed, it is hardly accurate to say that they even purport to relate to the precise issue now under consideration. In this connection it is significant that the weight of the comment contained in law journals with respect to the decision of the lower courts in this case has been adverse to respondents' position.[29]

The report made in 1915 by the Commissioner of Corporations[30] divided judicial proceedings

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[28] *The Sherman Act* (1917), 31 Harv. L. Rev. 412:

"* * * the Attorney General of the United States may invoke the application of the act by a bill in equity or indictment in the federal courts. The individual may also do so in a suit for triple damages under section 7 [p. 443]."

Procedure in Private Suits under the Sherman and Clayton Acts (1932), 32 Col. L. Rev. 335:

"A judgment of the efficacy of the antitrust laws should be based not alone upon the success of the government's suits, but also upon those brought under section 7 of the Sherman Act * * * [p. 335]."

Recovery of Treble Damages under the Sherman Act (1929), 38 Yale L. J. 503:

"* * * it appears proper at this time to review the decisions under section 7 of the Act * * *. The private right of action is provided as a supplement to the governmental enforcement of the Act [pp. 504–505]."

[29] *Claim of United States for Treble Damages under the Sherman Act*, 35 Ill. L. Rev. 223; *Right of the United States to Sue for Treble Damages*, 89 U. of Pa. L. Rev. 243–245; and compare *Is the United States Such a "person" as May Sue under Section 7 of the Sherman Act*, 26 Va. L. Rev. 958–959.

[30] Commissioner of Corporations' report to the President on Trust Laws and Unfair Competition (1915).

under the Sherman law into five broad classes: (1) Criminal prosecutions; (2) suits in equity by the Government; (3) condemnation proceedings by the Government with respect to goods transported in interstate commerce; (4) actions by private parties for treble damages; (5) actions at law or suits in equity between private parties where the law has been pleaded in defense, or where relief has been affirmatively sought from restraints imposed by agreements.

Whatever significance is to be attached to this classification, it can hardly be regarded as a deliberate judgment on the point at issue or as an adequate basis for a construction of Section 7 which deprives the United States of a remedy available to all other persons. It probably amounts to nothing more than recognition of the fact that the Government had never asserted its rights under Section 7.

Respondents rely also upon a statement made by Senator O'Mahoney on June 28, 1939, in support of a bill designed to permit the United States to collect civil penalties for violations of the Sherman Anti-Trust Act.[31] Whatever the weight to

[31] The Senator said (Cong. Rec., Vol 84, p. 8192):

"One of the principal reasons why the Anti-Trust Laws have not heretofore prevented combinations and mergers hostile to the public interest is that the penalties and remedies for violations as now provided are altogether inadequate. Jail sentences are seldom imposed, because the public does not place an economic offense in the same category with an ordinary criminal offense involving moral turpitude.

be accorded a Congressional statement as to the interpretation of a statute passed long before, the Senator's remarks do not necessarily carry the weight respondents place on them.

It seems unlikely that Senator O'Mahoney intended to refer to the present issue. The text of his remarks indicates clearly that he was considering the general deterrent effect of the statute and that when he spoke of remedies he was thinking of situations where the law had been violated but where the proprietary interests of the United States had not been injured. His failure to refer to the action for damages as a remedy of the United States which was "worth mentioning" is probably only another reflection of the fact that for many years the Government had not asserted its rights under Section 7.

CONCLUSION

For these reasons, it is respectfully submitted that the decision of the court below should be reversed and the cause remanded with instructions

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On the other hand, a $5,000 fine is of no concern to the large corporation.

"There is only one other remedy worth mentioning available under existing law to the Department of Justice—the civil action for an injunction. In addition, there is the action in damages by a private person who has been injured. Neither of these remedies is effective."

that the motion to dismiss the complaint should be denied.

FRANCIS BIDDLE,
Solicitor General.

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APPENDIX

THE LEGISLATIVE HISTORY OF THE ANTITRUST LAWS

I. THE PASSAGE OF THE SHERMAN ACT

A draft of a proposed antitrust act was first introduced by Senator Sherman of Ohio in the First Session of the 51st Congress on December 4, 1889 (Cong. Rec., Vol. 21, p. 96). The bill was referred to the Committee on Finance, headed by Senator Sherman, from which a second draft of the bill containing minor amendments was reported by that Senator on January 14, 1890 (Cong. Rec., Vol. 21, p. 541). A third bill, a substitute bill, was reported by Senator Sherman from the Committee on Finance on March 18, 1890 (Cong. Rec., Vol. 21, p. 2329).

Section 1 of the first draft introduced by Senator Sherman provided that "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition * * * or which tend to advance the cost to the consumer of any * * * article" are "against public policy, unlawful, and void." (Cong. Rec., Vol. 21, p. 1765.)

Section 2 of the bill introduced by Senator Sherman gave "any person or corporation" who had paid an enhanced price for goods by reason of the existence of a combination in restraint of trade, the right to sue for and recover "the full consideration or sum paid by him" for such goods. Section 3 of

the draft imposed criminal penalties enforceable by the district attorneys of the United States against persons entering into any combination of the character forbidden by the Act (Cong. Rec., Vol. 21, p. 1765).

The second draft of the bill reported by Senator Sherman from the Committee on Finance was substantially identical to the first draft except that Section 2 was modified to provide that "any person or corporation" injured by a combination of the character forbidden by the Act could sue and recover "twice the amount of the damages sustained, and the costs of the suit" (Cong. Rec., Vol. 21, p. 2599).

Senator Sherman's third bill reported from the Committee on Finance on March 18, 1890, provided (Cong. Rec., Vol. 21, p. 2455):

> That all arrangements, contracts, agreements, trusts, or combinations between two or more citizens or corporations, or both, of different States, or between two or more citizens or corporations, or both, of the United States and foreign states, or citizens or corporations thereof, made with a view or which tend to prevent full and free competition in the importation, transportation or sale of articles imported into the United States; or with a view or which tend to prevent full and free competition in articles of growth, production, or manufacture of any State or Territory of the United States with similar articles of the growth, production, or manufacture of any other State or Territory, or in the transportation or sale of like articles the production of any State or Territory of the United States into or within any other State or Territory of the United States; and all arrangements, trusts, or com-

binations between such citizens or corporations, made with a view or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void. And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue, all remedial process, orders, or writs proper and necessary to enforce its provisions. And the Attorney-General and the several district attorneys are hereby directed, in the name of the United States to commence and prosecute all such cases to final judgment and execution.

Sec. 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages sustained and the cost of the suit, together with a reasonable attorney's fee.

The respondents in the court below relied upon a colloquy between Senator Sherman and Senator Hoar as to the proper interpretation of Senator Sherman's third draft. When that passage is read in full it is apparent that it is not subject to the interpretation which appellees place on certain portions torn from their context. The colloquy was occasioned by Senator Hoar's suggestion that Section 1 of the bill would require the United States to prosecute suits for damages on behalf of

private individuals. Senator Sherman did not agree, pointing out that the remedies in Section 1 were different from those in Section 2. At the same time, Senator Sherman indicated that under his proposal the United States could bring a civil action for damages, but in fairness it must be said that the Senator was apparently referring to Section 1 and at no time considered the question of whether the United States could bring suit under Section 2.[1] The colloquy was as follows (Cong. Rec., Vol. 21, pp. 2563–2564):

> Mr. HOAR. I wish to ask the Senator from Ohio one or two practical questions about the details of the bill, which will take but a moment. The bill provides that—
>
> "The circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity."
>
> I suppose it is the purpose of the Senator from Ohio to give private citizens who are injured by these combinations or monopolies for the advancement of cost or preventing men from freely competing, a civil remedy in the courts, is it not?
>
> Mr. SHERMAN. Certainly.
>
> Mr. HOAR. I suppose that is the object, and I suppose any citizen of the United States might bring a suit in the courts if he had been wronged or claimed that he had been wronged in this way. Now the bill goes on and says:
>
> "And the Attorney-General and the several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution."

[1] See pp. 57–78, *infra*.

Mr. SHERMAN. That is confined to the first section of the bill.

Mr. HOAR. I understand that, and my question is confined to the first section of the bill.

Mr. SHERMAN. The first section of the bill does not give a civil remedy at all; it is the second section that gives a civil remedy.

Mr. HOAR. The first section says that—

"The circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section."

Now the Senator says the first section does not give the civil suit at all.

Mr. SHERMAN. It does give a suit in the name of the United States:

"And the Attorney General and the Several district attorneys are hereby directed, in the name of the United States, to commence and prosecute all such cases to final judgment and execution."

Mr. HOAR. Then the Senator avoids my first question and does not mean to answer it.

Mr. SHERMAN. I do.

Mr. HOAR. Let me put the question again. The first section of the bill declares:

"The circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, and to issue all remedial process, orders, or writs proper and necessary to enforce its provisions."

Now, this section has declared that all these arrangements are wrongful and unlawful, and that is the only declaration which gives any private citizen any right

to sue under them. That is the declaration of the first section. It seems to me that as the Senator has got this bill so drawn that any citizen of the United States can invoke the civil remedy and the civil jurisdiction provided in the first section under the bill—it seems to me there is no doubt of it whatever—and when he has done it the bill makes it the duty of a United States officer, the Attorney-General or the district attorney, not merely to commence and prosecute the suit, but to prosecute it without compromise or abandonment, because he is expressly commanded to prosecute it "to final judgment and execution."

Mr. SHERMAN. Well, Mr. President, the Senator has confounded the two sections together. They are absolutely distinct and independent, each conveying the proper authority and jurisdiction to the courts of the United States. The first deals only with combinations made in restraint of trade or to prevent free competition in the importation, transportation, etc., of articles. They are in the nature of public offenses against public policy. In regard to those in the first section it is declared that—

"The Attorney-General and the several district attorneys are hereby directed in the name of the United States to commence and prosecute all such cases to final judgment and execution."

And before that it is provided—

"The circuit court of the United States shall have original jurisdiction of all suits of a civil nature."

Mr. HOAR. Are they of a civil nature? The Senator has just said that these are public offenses and the statute says that they are suits of a civil nature.

Mr. SHERMAN. Cannot the United States commence a suit of a civil nature?

Mr. HOAR. For a crime?

Mr. SHERMAN. Not for a crime, but for a remedial proceeding. It is a proceeding such as is known in every State of the Union, as in the Commonwealth of Massachusetts and in other States. There are suits by the people of New York against these combinations. We have a suit of the people of Ohio and the people of Missouri; I quoted here a decision in a suit of the people of Illinois—just such things as are contemplated by this bill. If the Senator from Massachusetts will read the second section of the bill he will find that that alone deals with private suits.

"Section 2. That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages sustained and the costs of the suit, together with a reasonable attorney's fee."

It is the second section that gives the civil suit, and that is not to be prosecuted at all by the United States or by the officers of the United States. The first section deals with the public injury to the people of the United States and there the suit is brought in the name of the United States to restrain, limit, and control such arrangements so far as they are illegal. The second section gives a private remedy to every person injured.

It seems to me the two sections are as distinct from each other as possible.

Mr. HOAR. The Senator from Ohio states, in my very humble judgment, two entirely different and conflicting and inconsistent propositions. I agree and thoroughly understand that the second section of the bill gives individuals the right to private suits. I leave that out as settled. I am looking at the first section alone. The Senator says that the first section provides nothing but suits for public offenses, which are criminal suits and to be tried in the name of the United States, as for an offense against the United States. The language of the section is:

"And the circuit court of the United States shall have original jurisdiction of all suits of a civil nature at common law or in equity arising under this section."

I should like to ask the Senator again, does he understand that the United States is to enforce this proposed statute by a civil suit, and not by a criminal proceeding?

Mr. SHERMAN. I say that in a civil suit brought in the name of the United States the United States may sue on a contract; they may sue for a neglect; they may sue for a great many things. Those are civil suits. The distinction between a civil suit and a criminal suit, I need not tell the Senator from Massachusetts.

Mr. HOAR. I understand that. What will be the judgment?

Mr. SHERMAN. It may be a judgment of ouster of the corporation; *it may be a judgment for damages.*[2] Civil suits and criminal suits are easily distinguished.

Mr. HOAR. There is no difficulty in that.

[2] All italics are supplied.

> Mr. SHERMAN. Very well. This is a civil proceeding commenced by the people of the United States against these corporations, and a judgment may be, as in ordinary cases, an ouster of the power of a corporation; *it may be for damages;* there may be an injunction; there may be proceedings in *quo warranto,* and so of the other ordinary civil proceedings which are fixed by the judiciary act of the United States.
>
> But the second section provides purely a personal remedy, a civil suit also by citizens of the United States.

It is apparent that the foregoing passage deals solely with the question of whether the United States would be obligated to bring suits for the benefit of private individuals. Senator Sherman's statement to the effect that Section 2 gave individuals the right to maintain such suits which were "not to be prosecuted at all by the United States, or by the Officers of the United States" meant only that the United States was not to prosecute civil suits for damages on behalf of private litigants. At the same time Senator Sherman stated that the second section of his proposed bill gave "a private remedy to every person injured." It would seem that the word "person" was adopted as the broadest available generic term to describe the possible injured parties. Senator Hoar's statement that he agreed and thoroughly understood that the second section of Senator Sherman's proposed bill gave individuals the right to maintain private suits is no more than the reiteration of an obvious but not all-inclusive proposition. Senator Sherman's two references to suits by the United States for damages appear

to indicate that he believed that the United States could maintain such a suit under Section 1.

The respondents in the court below relied upon a subsequent statement by Senator Hoar wherein the Senator, commenting upon the inadequacy of Senator Sherman's bill by reason of its complete lack of penal provisions, stated (Cong. Rec., Vol. 21, p. 2567):

> Mr. HOAR. In the next place, I want to come to the subject which was the matter of a colloquy between the honorable Senator from Ohio and myself when he was addressing the Senate in his own right, in his own time, and that is, that this bill fails to afford any considerable remedy to anybody, either to the public or to any private citizen, except so far as it may give a power to private citizens to bring their suits. It provides, in the first place, only for jurisdiction in the courts of the United States in suits of a civil nature to enforce the provisions of the bill. There is no remedy by penal suit; there is no remedy by indictment or by any other criminal process, if there be any other criminal process known.
>
> The Senator says the suit of a civil nature gives, as against these corporations or partnerships, all the remedy which could exist for individuals when brought on the part of the United States. But what will it amount to? You cannot prove in any court that the United States will suffer damages, though you can say why, in a civil suit brought by the Attorney General or district attorney, the United States shall recover $100,000, or $200,000, or $500,000. It is an injury to the public, but there is no injury to the

> United States as a Government in respect of any of its property, or ownership, or function.

From the context of Senator Hoar's statement it is apparent that the Senator had in mind the ordinary case where the injury was to the public alone, and not "to the United States as a government in respect to any of its property, or ownership, or function." Clearly, the Senator was not thinking of the case where, as here, the United States is financially injured in its capacity as a purchaser of commodities.

Senator Hoar appears to have understood that the United States could sue for damages under the second section of Senator Sherman's substitute bill, which, as noted above, permitted suit for double damages by "any person or corporation injured or damnified" by any forbidden combination. Thus, in discussing a proposed amendment imposing a penalty for violation of an injunction, Senator Hoar stated (Cong. Rec., Vol. 21, p. 2641):

> Now, that is a clear penalty and nothing but a penalty for an offense. It is a part of the civil remedy of the individual who suffers [in the discretion of the court the penalty was payable to the complaining party]; it is not the sum *which is to be recovered by the United States if it has suffered in any of its properties or functions which would* make it a suitor for it to assert its own rights, but it is a clear, sheer penalty. The contempt of court has been satisfied previously by the assumption of the amendment. *The injury to the United States or to anybody else in the way of*

property or business or any other material necessary is satisfied in another way. * * *

In making this statement it is not clear whether Senator Hoar believed that Section 2 of Senator Sherman's bill gave "to the United States or to anybody else" a right to recover damages, or whether he believed that the remedy was conferred on United States by Section 1 and on other persons by Section 2. Whichever of these views he held, it is a fair inference that he believed that in one way or another the bill conferred upon the United States the right to sue for damages.[3]

Senator Sherman's bill, after much debate and many amendments, was referred on April 2, 1890, to the Judiciary Committee of the Senate, of which Senator Sherman was not a member. In the Judiciary Committee, of which Senator Hoar was a member, a new Bill was prepared. In the new Bill presented to the Senate by the Judiciary Committee the civil remedy for damages, formerly Section 2, was embodied in Section 7 of the bill. The debate on Section 7 was confined largely to a proposed amendment which would have given the

[3] Senator Hoar apparently understood the words "any person or corporation" as used in Section 2 of the bill to be synonymous with the words "any purchaser." This is indicated by the fact that in the preceding Congress when the Senate was considering an earlier antitrust bill introduced by Senator Sherman, Senator Hoar offered an amendment which provided "* * * if any purchaser of articles specified in the preceding section shall be put to additional cost by the advancing of the price of such articles * * * he may * * * sue for and recover the damages sustained * * *" (Cong. Rec., Vol. 20, p. 1167).

state courts jurisdiction of suits under Section 7. There were no subsequent statements in debate which appear to relate directly to the present issue. Section 8 was not a subject of debate in either the Senate or the House. Section 7 was quoted but not discussed and Section 8 was not referred to in the report of the Judiciary Committee of the House (H. Rept. 1707, 51st Cong., 1st Sess.).

It will be recalled that Senator Sherman's earlier proposal was that "any person or corporation injured or indemnified" by a combination violating the Act could sue and recover double damages. The bill which was enacted provided in Section 7 that "any person who shall be injured in his business or property" by reason of a violation of the act could sue and recover triple damages.

It thus appears that the phraseology used in drafting Section 7 was substantially identical to that previously used in Senator Sherman's bill which was referred to on the floor of Congress by Senator Hoar when he stated (Cong. Rec. Vol. 21, p. 2641) "the injury to the United States or to anybody else in the way of property or business or any other material necessity is satisfied in another way."

The bill presented to the Senate by the Judiciary Committee was subsequently adopted without amendment. It was approved by the House and became the so-called "Sherman Act." (Cong. Rec. Vol. 21, pp. 6208, 6312, 6922.)

II. THE PASSAGE OF THE WILSON TARIFF ACT

The antitrust provisions of the Wilson Tariff Act, Sections 73 to 77 (Act of Aug. 27, 1894, c.

349, 28 Stat. 509; 15 U. S. C. A. Secs. 8–11, 15 and note), were introduced by Senator Morgan July 3, 1894, as an amendment to the tariff bill (Cong. Rec., Vol. 26, p. 7117). Senator Morgan, explaining his amendment, stated that Section 77, the section which confers the right to recover triple damages, was copied exactly from Section 7 of the Sherman Act (Cong. Rec., Vol. 26, pp. 7117, 7119). The proposed amendments were the subject of very little debate and were adopted without amendment. No statements were made in the debate which appear to relate to the present issue.

III. THE PROPOSED LITTLEFIELD AMENDMENT TO THE SHERMAN ACT, H. R. 10539, 56TH CONGRESS, FIRST SESSION

The respondents below referred to Section 9 of a bill to amend the Sherman Act introduced by Representative Littlefield April 7, 1900 (H. Res. 10539). The purpose of the bill was to provide additional and more stringent remedies against the combinations condemned in the Sherman Act. Only minor, nonsubstantive changes in the Sherman Act were proposed. Section 13 of the proposed act (H. Rept. 1506, 56th Cong., 1st Sess. p. 5) authorized private persons to bring any action which the United States could bring. Section 9, a part of which respondents have quoted, authorized individuals as well as the United States to bring an action to enjoin illegal combinations from carrying on interstate commerce. It also forbade the use of the mails by the defendants and their officers in furtherance of their illegal purpose and provided that their products should be forbidden interstate transportation.

It appears from the committee reports (H. Rept. 1506, 56th Cong., 1st Sess.) and the debates on

the proposed amendment that Congress intended to extend the remedies available to private persons not to limit or define actions by the Federal Government. None of the discussion on the amendment concerned the question whether the United States could bring an action under Section 7 of the Sherman Act. Section 9 provided (Cong. Rec., Vol. 33, p. 6491):

> That every corporation, association, joint stock company or partnership doing business in any State of the United States, or in any Territory belonging thereto, or in the District of Columbia, producing, manufacturing, or dealing in any article of commerce, when organized, formed, managed, or carrying on business for the purpose of controlling or monopolizing the manufacture, production, or sale of any such article of commerce, or for the purpose of increasing or decreasing the cost of such article of commerce to the user or consumer thereof for the purpose of preventing competition in the manufacture, production, or sale thereof, is, for the purposes of this act, hereby declared to be illegal, and may be proceeded against at the suit of any person or persons or corporation or association, or by and in behalf of the United States, and perpetually enjoined and restrained from doing or carrying on any interstate or foreign commerce whatever, either with the States or the Territories of the United States or the District of Columbia, or any foreign country, and, if adjudged illegal within the meaning of this act, it and its officers and the members of such association, joint stock company, or partnership shall be, and hereby are, forbidden and prohibited the use of the mails of the United

States in aid or furtherance of any such business or purposes; and no article of commerce produced, or manufactured, or owned and dealt in by any such corporation, association, joint stock company, or partnership so organized, formed, managed, or carrying on business shall be transported or carried without the State or Territory in which produced or manufactured, or in which same may be, or without the District of Columbia, if produced, manufactured, or found therein by any individual, corporation, or common carrier in any manner whatever. All such articles of commerce shipped in violation of the provisions of this act shall be forfeited to the United States, and may be seized by any marshal or deputy marshal of the United States, or by any person duly authorized by law to make such seizure, and when so seized shall be condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law: *Provided, however,* That such articles of commerce may be so carried or transported for the use of the consignor or consignee.

IV. THE PASSAGE OF THE CLAYTON ACT

Section 7 of the Sherman Act was substantially reenacted as section 4 of the Clayton Act, which provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and

> shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [Oct. 15, 1914, c. 323, § 4, 38 Stat. 731; 15 U. S. C. 15.]

The report of the Judiciary Committee of the House on section 4 (section 5 of the bill introduced by Representative Clayton) stated that section 4 was "supplementary to the existing laws" (H. Rept. 627, 63rd Cong., 2nd Session, p. 14). The Judiciary Committee of the Senate stated that it was not proposed by the Clayton bill "to alter, amend or change in any respect the original Sherman Antitrust Act." (S. Rept. 698, 63rd Cong., 2nd Session, p. 1.)

Section 1 of the Clayton Act embodies the definition contained in section 8 of the Sherman Act in the following words:[4]

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. [Oct. 15, 1914, c. 323, § 1, 38 Stat. 730; 15 U. S. C. 12.]

Referring to this section the Committee of the House stated (p. 7):

> Section 1 of the bill defines technically for the purposes of this bill certain words, phrases, and terms used in the body of the bill. The definitions thus given are de-

[4] Representative Webb, Chairman of the Judiciary Committee, stated that the definition of the word "person" contained in section 1 "follows the words of the Sherman Law" (Cong. Rec., Vol. 51, p. 9414).

signed merely for convenient reference and to avoid repetition.[5]

Section 4 of the proposed bill was the subject of very little discussion in either the House or the Senate. On the floor of both houses it was stated that the remedy conferred by section 4 was merely a reenactment of that given by section 7 of the Sherman Act (Cong. Rec., Vol. 51, pp. 9164, 16319 (Representative Floyd), 9595 (Representative Green), 14214 (Senator Shields), 15938 (Senator Nelson)) and the section was generally approved. In the very meager debates on this section, the question whether United States could bring an action for damages under section 7 of the Sherman Act or section 4 of the Clayton Act was not raised.

In the course of the very extensive debates on other sections of the bill, however, remarks were made which appear to have some bearing on the question. These remarks are discussed below.

Respondents have referred to an isolated remark made by Senator Culberson, Chairman of the Judiciary Committee, during a debate on an amendment offered to the committee substituted for section 6 of the House Bill. Section 6, as reported by the judiciary committee, provided that any final judgment or decree that defendants' activity constituted a violation of the antitrust laws in any suit or proceeding in equity brought by the United States should be prima facie evidence against the defendant in any action brought by a private indi-

[5] The Senate report stated that this section "is one confined exclusively to the definitions of terms employed in the bill * * *" (p. 42).

vidual.[6] The discussion in which Senator Culberson's remark occurs is as follows (Cong. Rec., Vol. 51, pp. 13897–8):

> The VICE PRESIDENT. The question is on the amendment reported by the committee, on page 6, line 12, as amended.
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> Mr. BRYAN. Mr. President, on page 6, I move to strike out the words "in equity," in line 13, so that a final judgment or decree may be used as evidence regardless of whether or not the suit was in equity. I see no reason why a distinction should be made between a common-law suit, a criminal prosecution, and a suit in equity in the use of the record.
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> The VICE PRESIDENT. The question is on the amendment to the amendment proposed by the Senator from Florida.
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> Mr. CULBERSON. Mr. President, I suggest to the Senator from Florida that it would be better, and make it clearer, if, after the language in line 12, instead of striking out the words "in equity" there were inserted the words "in any criminal prosecution or."
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> Mr. BRYAN. That is perfectly satisfactory, Mr. President; it accomplishes the same purpose, I think. If my amendment to the amendment should prevail, it would read:
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> "That a final judgment or decree heretofore or hereafter rendered in any suit or proceeding."
>
> Certainly a criminal prosecution is a suit; and the language then would cover all classes of suits, whether they be criminal prosecutions or common-law suits or suits in equity, by simply striking out the words "in

[6] Section 6 of the bill was subsequently enacted as section 5 of the Act quoted, *supra*, pp. 36–37).

equity." I have no objection, however, if the Senator prefers his amendment.

Mr. CULBERSON. We do not ordinarily refer to a criminal prosecution as a suit, I think.

Mr. BORAH. We would not refer to a criminal prosecution as a suit.

Mr. BRYAN. I have always heard it so referred to. I never heard it questioned that it was a suit.

Mr. BORAH. Oh, well, it is not a suit in the sense in which we use that term in referring to a suit in equity.

Mr. BRYAN. However, I am not particular about the phraseology. I think it ought to be so that a record in a criminal suit or prosecution could be used in a subsequent proceeding with the same force and effect as if it had been a suit in equity.

Mr. REED. Mr. President, it occurs to me that the matter suggested by the Senator from Florida—though I am not sure that I am in accord with him—would be covered by inserting, in line 13, between the words "in" and "equity," the words "law or," so that it would read "proceeding in law or equity," and after the word "equity" by inserting "or in any prosecution."

Mr. BRYAN. Mr. President, that is practically the same language as suggested by the chairman of the committee. I understand his suggestion is, in line 12, after the word "rendered," to insert "in any criminal prosecution or," so that it would read:

"That a final judgment or decree heretofore or hereafter rendered in any criminal prosecution or in any suit or proceeding in equity."

I am not at all particular about the phraseology.

Mr. REED. Leave out the words "in equity," and let it read "any suit or proceeding." That would cover any kind of proceeding.

Mr. BRYAN. That was my motion.

Mr. CULBERSON. There is no suit authorized by any of these statutes by the United States except a criminal prosecution or a suit in equity. The United States does not bring a suit at law for damages.

Mr. BRYAN. It occurs to me, Mr. President, that if the words "in equity" were stricken out, so that it would read "rendered in any suit or proceeding brought by or on behalf of the United States under the antitrust laws," it would be as broad as the antitrust law itself; but I am not interested in the phraseology. So I accept the suggestion of the Senator from Texas, and adopt his language, and offer it, withdrawing my first amendment.

A considered analysis of the remedies which are available against a violator of the antitrust laws was made subsequently by Representative Webb, Chairman of the Judiciary Committee, during the debates on the Conference Committee report. Answering the charge that the bill as reported by the Conference Committee was without "teeth," Representative Webb enumerated five civil remedies, the first of which was an action for treble damages under section 4, which might be brought by an individual or the United States against any one violating section 2 or section 3 of the bill. Section 2 prohibits price discrimination between customers where the effect is substantially to lessen competition. Section 3 prohibits tying clauses in contracts. Representa-

tive Webb's speech in part is as follows (Cong. Rec., Vol. 51, pp. 16274–5):

> Mr. WEBB. Now, gentlemen, as to the "teeth" that they say have been extracted from this bill, I tell you that there are more "teeth" in these two sections than anyone may imagine, and I am going to show you the "teeth." All through this bill we have provided civil remedies to stop the practices denounced in sections 2 and 3 of the conference report, and I for one was very, very insistent on keeping these two sections in the bill in order that these extraordinary remedies given to the individual might apply.
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> Now, here is the first "tooth" I will refer you to, and that is in section 4:
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> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."
>
> Now, let a businessman somewhere in the United States, or 40 or 50 of them, be damaged by the things that are denounced as unlawful in this section, and let them all bring suit. That is bigger, as my friend from Kentucky [Mr. Johnson] says, than a "harrow tooth," and will have a more deterrent effect on the men who practice those things than a mere criminal penalty, and we all know that the disinclination of juries in some quarters to convict men under these criminal sections has resulted in their acquit-

tal. For instance, take the case of the Beef Trust. The average man thought the Beef Trust was a criminal, but the jury in Chicago would not convict them. Now, the next thing is to give the individual who is harmed by these practices—not necessarily restraints of trade or monopolies, but things that lead up to restraints of trade and monopolies—the right to bring suit for any amount he pleases.

But it goes still further—

Mr. BARTLETT. That is the identical provision that the House adopted?

Mr. WEBB. Yes; that is the identical provision that the House adopted, and we kept it in the bill.

Mr. STAFFORD. Mr. Speaker, will the gentleman permit an interruption?

Mr. WEBB. Yes.

Mr. STAFFORD. Take the case of the shoe manufacturers of the country, where they suffer by reason of the monopoly of the United Shoe Machinery Co. Suppose a shoe manufacturer should go into court and bring suit against the United Shoe Machinery Co. Where would their damages be? They would not be able to prove any damages, because it was based on supposition.

Mr. WEBB. If a man has been damaged and it is not speculative, he can prove it in court.

Mr. STAFFORD. It is speculative entirely, and this will not give him any relief, because you are not punishing the concerns criminally for the offense.

Mr. WEBB. If the gentleman will go with me one step further, I will show him how he can stop it as an individual, and not depend upon the Government of the United States to do so. That is something new.

Section 6 of the House bill, which is section 5 of the conference report, provides, among other things, that—

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

Now, I call the attention of my friend from Wisconsin [Mr. STAFFORD] and the attention of the House to section 11, which is another "tooth," as reported by the conferees. It reads as follows:

"That authority to enforce compliance with sections 2, 3, 7, and 8 of this act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board, where applicable to banks, banking associations, and trust companies, and in the Federal Trade Commission where applicable to to all other character of commerce, to be exercised as follows."

Now, the value of these two sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only suspend the statute of limitations against an individual if a Government suit is brought against a trust, but we also require the Federal Trade Commission to stop these practices and take those guilty of such practices into court.

But that is not all. Some argue that

after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:

"No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts."

So you have three or four distinct remedies, all of which may be invoked at the same time.

Now, section 12 provides—

"That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business: and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."

I will say to my friend from Wisconsin that we are liberalizing the procedure in the courts in order to give the individual who is damaged the right to get his damages anywhere—anywhere you can catch the offender, as is suggested by a friend sitting near by. And that is not all. Section 15 provides—

"That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation

shall be enjoined or otherwise prohibited."

Mr. BATHRICK. Mr. Speaker, will the gentleman yield?

Mr. WEBB. Yes, sir.

Mr. BATHRICK. How does the gentleman construe those words "under the direction of the Attorney General"? Does that mean that a district attorney cannot act unless he receives direction from the Attorney General?

Mr. WEBB. Yes. That is the universal rule. The Attorney General, being the head of the Department of Justice of the United States, should be consulted before the bringing of one of these suits.

Mr. BARTLETT. That is the same language as in the Sherman law.

Mr. WEBB. Yes. That is the language in the Sherman law. It extends to the acts denounced in this particular bill, also. But if any district attorney in the United States feels that these sections are being violated, all he has to do is to ask the Attorney General for permission to institute suit, and begin proceedings immediately.

Mr. BATHRICK. If we have some Attorneys General such as we have had in the past, the directions will not be given.

Mr. WEBB. Yes; of course. But we must leave something to the Executive. We cannot do everything by legislation. We must leave something to the Department of Justice and the courts. But that is not the only remedy, I will say to my friend. I have narrated three or four. If the Attorney General should be negligent, the individual himself has a wide-open door to go into court and sue. And he cannot only do that, but listen to the language of section 16:

"Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3—

These two sections which we are discussing now—

"7 and 8 of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue."

There are five different distinct civil remedies that are given to individuals, to the Department of Justice, and to the Trade Commission for the purpose of preventing and restraining the acts denounced in sections 2 and 4, which are sections 2 and 3 of the bill under consideration as it came from the conference.

Upon the conclusion of these remarks several members of the House asked Representative Webb questions concerning the remedies under the proposed bill and the effect of the proposed bill on the penal sections of the Sherman Act. During the debate which had focused on the remedies that may be brought under the antitrust laws, Representative Webb restated, as a general principle, that five civil remedies, including an action for treble damages, are available to an individual

and to the Government. The discussion in which this remark occurred is as follows (Cong. Rec., Vol. 51, pp. 16275–6):

> Mr. WEBB. Exactly. That is a fair statement of it, and that is what led a great many Members of the House and Senate to the conclusion that those acts that did not violate the Sherman law should not be denounced as criminal acts in the first instance in a new law. If a number of small links in the chain finally result in violation of the Sherman law, then the person who constructs the chain becomes subject to the pains and penalties of the Sherman law. A person who only builds one link in the chain is denounced here. There are people, and honest people, who thought that we ought not to put a man in jail for making one link, but that we should forbid him from forging other links. The Sherman law takes care of restraints of trade and monopoly. This bill is intended to prevent those individual acts which, if multiplied and persisted in, may lead to a violation of the Sherman law.
>
> Mr. GOULDEN. Will the gentleman yield?
>
> Mr. WEBB. Yes.
>
> Mr. GOULDEN. In the elimination of criminal prosecutions as proposed by the conference, does the gentleman think it will have the same moral effect on the man who is an offender under this law and that you propose to reach by this change?
>
> Mr. WEBB. If I had to choose between the civil remedies provided in this bill and the criminal provisions, I would let the criminal penalties go and keep the civil remedies. Personally, I would like to have seen both kept in the bill.

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Mr. GOULDEN. Is it not much simpler and more effective to prosecute for criminal offenses of this character?

Mr. WEBB. No; if a criminal offense, you have to bring one suit through the Department of Justice. Under the civil remedies any man throughout the United States, hundreds and thousands, can bring suit in the various jurisdictions, and thus the offender will begin to open his eyes because you are threatening to take money out of his pocket.

Mr. GOULDEN. And the gentleman does not think it would be more difficult to prosecute under the civil law as now proposed than under the criminal law as originally passed by the House?

Mr. WEBB. No; a preponderance of evidence suffices in a civil action. Guilt beyond a reasonable doubt must be shown in criminal actions.

Mr. RUSSELL. I understand the proceeding by injunction for relief of the parties damaged is not the only remedy.

Mr. WEBB. Oh, no; it is only one of five different remedies.

Mr. RUSSELL. They have the right to sue for damages or for treble damages without any injunction proceeding at all.

Mr. WEBB. *Certainly; the remedies are cumulative. The remedies pile up, and all of the remedies are open to the individual and to the Government in a suit.*

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